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SUPREME COURT OF THE UNITED STATES.

No. 311

DONALD R. MANNING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Fifth Circuit,

and

BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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To the United States Circuit Court of Appeals, Fifth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Donald R. Manning, respectfully shows:

1. On April 3, 1945, an information containing eight counts, each count charging a violation of the Federal Pure Food and Drug Act—21 U. S. C. 352; 21 U. S. C. 331, 321—(R. pp. 1-24) was filed in open court in the District Court of the United States for the Southern Division of the Northern District of Alabama. Petitioner was duly arraigned, plead guilty as charged (R. p. 54), and was sentenced to imprisonment for a period of thirty days under count one of the information (R. p. 56) and placed on probation for a period of three years under counts one,

two, three, four, five, six and seven of the information (R. p. 56) on the 18th day of October, 1945. The record of judgment does not show that the petitioner was informed of any conditions of probation by the court (R. p. 56). On November 15, 1946, petitioner was called before Hon. Seybourn H. Lynne, a Judge of said Court, to answer a charge of violating the terms of his probation. Though no complaint appears in the record as of that date (R. pp. 57-59), the petitioner made a motion to require the government to file a formal complaint, which said motion was, by the court, denied (R. pp. 58-59) and hearing continued until November 22, 1946 and petitioner admitted to bail fixed at $500.00 (R. pp. 63-70). The government, through its District Attorney, did informally announce in open court that petitioner was charged with violating the terms of his probation by practicing medicine without a license in Bessemer during the period of May 1, 1946 to August 31, 1946 (R. p. 69), and also by using the mails to defraud one Charles Edel (R. p. 69) and using the mails to defraud one M. T. Hanson (R. p. 70) and using the mails to defraud one Olin Harrold (R. p. 70). Before the Hon. Clarence Mullins, a Judge of said court, on November 22, 1946, petitioner again moved the court for a filing of a complaint and for a more particular statement of the type of violation so that he would know definitely how to act (R. p. 71), which motion was, by the court, overruled. The court expressed itself as being of the opinion that petitioner was not even entitled to a formal trial (R. p. 71). Petitioner then moved for a more particular specification of the acts or conduct on the part of this petitioner and informed the court that in order to obtain information with regard to the matters which petitioner was called upon to defend against, counsel for petitioner did undertake to obtain a list of the witnesses summoned by the government against the petitioner from the Clerk's office, which was refused, and stated to the court that petitioner

was not informed as to whom the witnesses against him might be, nor with regard to the particular acts of conduct which said witnesses would testify against him and again moved for a more particular specification of the acts of conduct charged against him, which motion the court overruled (R. p. 73). After hearing the testimony admitted in evidence the court proceeded to adjudge the petitioner guilty of having violated the terms of his probation and sentenced the petition on counts two, three, four, five, six, seven and eight to pay a fine of $750.00 to stand committed, and committed him to the custody of the Attorney General of the United States for a period of one year (R. pp. 61-62). The probation officer's statement as to the viclation of conditions of probation appears in the record at pages 262-264. A vague and indefinite complaint charging violation of the terms of probation appears to have been filed November 13, 1946, but does not appear to have been served on petitioner (R. 261-262). Notice of appeal was filed November 26, 1946 (R. 257-258). Petitioner was admitted to bail in the sum of $1500.00, which he made (R. 258-259). This appeal was argued and submitted to the Circuit Court of Appeals for the Fifth Circuit and a judgment affirming the judgment of the court below was rendered on May 28, 1947 and an opinion rendered which is reported in 161 Federal Reporter (2d), p. 827 (R. pp. 273-278). Application for rehearing was duly filed within the time allowed by the Circuit Court of Appeals (R. pp. 281-282) and was, by the Circuit Court of Appeals, denied on August 2, 1947 (R. p. 283).

2. **Statement of Facts.** Donald R. Manning was engaged in business in Bessemer, Alabama, under the name of "Manning Herb House." The firm name is printed on his stationery (R. p. 97) and he had been engaged in such business since 1941 at Bessemer, Alabama (R. p. 251). He employed a registered pharmacist to compound the var-

ious medicines which he sold, whose name was J. H. McKelvey (R. pp. 207-229). Correspondence between him and his customers was addressed by his customers to "Manning Herb House" and was answered on stationery carrying this firm's name.

The government did not contend that the drugs constituting the ingredients of each of the proprietary medicines involved in this hearing on probation did not have beneficial properties, nor did the government contend that they did not have economical value comparable to that of other drug preparations sold in regular drug stores under their proprietary trade names without doctors' prescriptions. Many similar proprietary drug compounds were introduced in evidence by the petitioner and he sought to show that they were sold at a price comparative to the prices for which he sold his drugs and contained the same chemical ingredients and had the same therapeutic value. The government then disclaimed any intent to show that the drugs sold by petitioner did not have commercial value (R. pp. 225-226) nor that the value and commercial price of his drugs constituted a badge of fraud (R. pp. 225-226). It was undisputed that petitioner sold his preparations under a guarantee to refund money to the customer if the customer was not satisfied and that in every instance where dissatisfaction was expressed by a customer he did refund the money and that each package of merchandise which went out of his place of business carried a printed statement of this guarantee in the package (R. pp. 187-188).

There was no evidence that he had shipped any goods in interstate commerce since his conviction on the original information and his testimony that he had shipped no goods in interstate commerce was without dispute. The probation officer, Mr. Jordan, was present in the court throughout the hearing and petitioner's testimony that he had conducted his business, since the day he had

been put on probation, in strict accordance with the directions given him by the probation officer, Mr. Jordan, was not disputed. His testimony that he had kept the probation officer fully informed and that the probation officer had visited his place regularly and had observed his manner of doing business and had read the copies of letters which he had sent to his customers, was all without dispute on the part of the probation officer. His testimony to the effect that he frequently requested the probation officer to advise with him regarding the practices of his business, informing the probation officer fully with regard to these practices, was without dispute.

There was no testimony to support charge 2 of the probation officer's statement of violations (R. p. 263) charging this petitioner with using the mails to defraud one Charles Edel of Box 117, Cherokee, Alabama. There was testimony that a pure food and drug administration agent from Washington, D. C., concocted a letter to be used in entrapping this petitioner, signing the same "M. T. Hanson, Repton, Alabama," and forwarded the same to the postmaster at Repton, Alabama, to be mailed to the petitioner and that petitioner answered this letter, making a shipment of medicines which he recommended for the ailments which the said "Hanson" represented himself to suffer and that this package of medicines contained the guarantee to refund the money if not satisfactory. The letter sent by petitioner to the said "Hanson" was written upon stationery bearing the headline "Manning Herb House" and was intercepted by the postmaster at Repton, Alabama and sent to the Pure Food and Drug Agent in Washington, D. C. There was no such person as "M. T. Hanson." This was a fictitious name signed for the sole purpose of entrapping petitioner. This constituted the government's evidence in proof of charge 3 contained in the probation officer's statement as to violations (R. p. 264).

The substance of the evidence with regard to charge 4 contained in the probation officer's statement of violations (R. p. 264) is the same as that in support of charge 3.

The evidence with regard to charge 1 contained in the probation officer's statement as to violations (R. 263), charging this petitioner with practicing medicine without license during the period of May 1, 1946, to August 31, 1946, consisted of evidence that the petitioner, at his place of business, operated a number of bath cabinets and had attendants to wait upon his customers who desired baths and used a stethoscope to determine whether or not the condition of a person's heart would permit such person safely to take the hot baths. It was without dispute that such instruments are used by all such bathhouses, and, further, that he sold his proprietary remedies.

There was also evidence that in writing his letter in reply to Hanson and Harrold he expressed his opinion as to the cause of their physical ailments and it is chiefly upon these letters to Hanson and Harrold that the government depended to make out its case that petitioner was practicing medicine without license. The letterhead upon which this letter was written clearly disclosed that the writer made no claim to be a physician.

The government made much of the fact that petitioner had a big sign at his place of business which read: "D. R. Manning Herb House" and had such signs on his windows and that in one of these signs the period after the initial letter "D" was omitted. Petitioner stated that this period had been worn off in the course of time by washing the window. The government contended that these signs were intended to deceive the public into believing that petitioner was a doctor of medicines.

There was evidence, without dispute, by men experienced in retail drug merchandising, that it was common for drug-

gists to hear people describe their physical symptoms and then to recommend proprietary drugs to them as remedies for their diseases.

There was also introduced in evidence, by the petitioner, a number of packages of drugs with the literature contained in the package recommending these drugs for physical ailments, which drugs were purchased from reputable retail drug stores in Birmingham, Alabama.

There was also introduced in evidence various advertisements clipped from daily issues of newspapers published in Birmingham, advertising various and sundry proprietary medicines and recommending such medicines for particular diseases.

There was no charge contained in the complaint against this petitioner, nor contained in the probation officer's statement as to violations of conditions of probation, that this petitioner had violated the condition of his probation with reference to dishonesty. It was admitted in the testimony that petitioner gave commercial value for the money received equal to that given by other persons engaged in the sale of proprietary medicines, and it was admitted in evidence that his character for truth and veracity and his general reputation for truth and honesty were good. There was no contention that he had ever committed any dishonest act, except as such contention might be related to the charge that he used the mails to defraud Hanson and Harrold.

JURISDICTION.

It is contended that the United States Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals here sought to be reviewed pursuant to the provisions of Section 347 (a) (b) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

It is contended by the petitioner:

1. That charge 1 contained in the probation officer's statement as to violation of conditions of probation (R. p. 263) can only be construed to mean that he was violating the Alabama law by engaging in the practice of medicine, as defined by the Alabama law, without having first obtained a license from the State Medical Board of the State of Alabama and that the Alabama law with regard to the construction of the evidence in this particular case is controlling.

2. That the decision of the Circuit Court of Appeals to the effect that there is evidence of each material element of the offense of practicing medicine without license as defined by the Alabama law is in conflict with the controlling decisions of the courts of last resort of the State of Alabama, in particular the case of **Harper v. State**, 102 So. 55, construing Section 262, Title 46, of the Alabama Code of 1940.

3. That the Court of Appeals erred in holding that each constituent element of the offense of using the mails to defraud was presented in the testimony in this case and in this respect the Court of Appeals, in its opinion, is in conflict with the applicable decisions of the Circuit Courts of Appeals of other Circuits and the Supreme Court of the United States, viz.: **West v. U. S.** (Tenth Circuit), ... Fed. (2d) 96; **Gold v. U. S.** (Eighth Circuit), 36 Fed. (2d), at page 32.

4. That the Circuit Court of Appeals erred in holding that a probationer charged with violating the conditions of his probation in that he had violated a state law, or a federal law, could have his probation revoked without any

evidence of some essential element necessary to constitute a violation of the particular state or federal law in question.

5. That the Circuit Court of Appeals erred in holding that this petitioner was given fair notice of the charges laid against him and given fair opportunity to defend against said charges by the trial court and, in that respect, is in conflict with the case of **Hollandsworth v. U. S.**, 34 Fed. (2d) 423 (Fourth Circuit).

REASONS RELIED ON FOR OBTAINING THE WRIT.

1. The judgment and opinion of the Circuit Court of Appeals holding that a person may have his probation revoked upon the charge of violating a state law without som proof of each essential element necessary to constitute a violation of the state law is contrary to the applicable decisions of the Supreme Court of the United States and of the Circuit Court of Appeals of other Circuits, among which are the cases of:

Escoe v. Zerbst, 55 Sup. Ct. 717;
Hollandsworth v. U. S., 34 Fed. (2d) 423;
Burns v. U. S., 287 U. S. 216, 53 Sup. Ct. 154.

2. The holding of the Circuit Court of Appeals that there was some evidence in this case sufficient to satisfy the Judge presiding at the trial below that petitioner had violated the Alabama law by practicing medicine without a license was in conflict with the controlling law as announced by the courts of last resort of the State of Alabama in the case of **Harper v. State**, 102 So. 55.

3. The judgment and opinion of the Circuit Court of Appeals holding that there was evidence sufficient to justify the trial judge in finding that the petitioner had violated the federal laws prohibiting the use of the mails

in furtherance of a scheme to defraud was in conflict with the holding of the Circuit Court of Appeals of the Eighth Circuit in the case of **Gold v. U. S.** (Eighth Circuit), ... Fed. (2d) 16-32; **West v. U. S.** (Tenth Circuit), 68 Fed. (2d) 96, and **Durland v. U. S.** (U. S. Sup. Ct.), 16 Sup. Ct. Rep. 508-511, 161 U. S. 306-313, in that there was no evidence that petitioner was not conducting his business of merchandising proprietary remedies in good faith.

4. The holding of the Circuit Court of Appeals was contrary to due process of law and with the applicable decisions of the Supreme Court and the Circuit Courts of Appeals of other Circuits in that the Circuit Court of Appeals for the Fifth Circuit in the instant case has held that a probationer may have his probation revoked upon a charge of violating a state law without some evidence of each essential element of the offense necessary to constitute such a violation.

5. The holding of the Circuit Court of Appeals was contrary to due process of law and with the applicable decisions of the Supreme Court and the Circuit Courts of Appeals of other Circuits in that the Circuit Court of Appeals for the Fifth Circuit in the instant case has held that a probationer may have his probation revoked upon a charge of violating a federal law prohibiting use of the mails in furtherance of a scheme to defraud without some evidence of each essential element of the offense necessary to constitute such a violation, which amounts to a holding that a federal judge may arbitrarily revoke a probation with evidence of a violation of some condition of the probation being satisfactorily proven as to each essential element thereof, in conflict with **Escoe v. Zerbst**, 55 Sup. Ct. 717; **Hollandsworth v. U. S.**, 34 Fed. (2d) 423; **Burns v. U. S.**, 287 U. S. 216, 53 Sup. Ct. 154.

INJURY.

This petitioner saith that he suffered serious grievous injury in that, notwithstanding he has conducted his mercantile business of selling proprietary drugs in strict compliance with the state law of Alabama and in strict compliance with the federal statute prohibiting the use of the mails with intent to defraud, he has upon a probation hearing been held guilty of violating the Alabama state law prohibiting the practice of medicine with license and been found guilty of using the mails in furtherance of a scheme to defraud; and notwithstanding he has constantly advised with and informed the probation officer of his method and manner of conducting his business and has, in good faith, attempted to comply with the conditions of his probation, he has had his probation revoked without evidence sufficient to satisfy the Judge presiding at the trial below that he has violated the conditions of his probation in the particulars charged against him and has been sentenced upon such revocation of his probation to pay a fine of $750.00, to stand committed, and to be committed to the custody of the Attorney General for a period of one year; and your petitioner further says that there was no evidence that the merchandise sold by him through the mails, as charged, was not of value with relation to the price charged comparative to that charged by all others in the business of retailing proprietary remedies; that such medicines were not beneficial for the purpose for which they were sold; that he did not conduct his business in good faith; that he did not make refunds to all dissatisfied purchasers; and petitioner further says that his general good reputation was admitted by the government and by the Court; that there was no evidence of any act of dishonesty and no charge of an act of dishonesty was contained in the charges upon which his

probation hearing was conducted and that there was no substantial evidence that he had violated the Alabama law prohibiting the practice of medicine without license; that the revocation of his probation was an arbitrary act of the trial judge not justified by the evidence rendered at the hearing upon the charges contained in the complaint upon which he was tried; and your petitioner herewith presents, as a part of this petition, a transcript of the record in the Circuit Court of Appeals for the Fifth Circuit, duly certified by the Clerk of said Court; except that Exhibits in evidence sent down to the Circuit Court of Appeals in their original form, consisting of documents and books and packages of medicine, cannot be printed in the printed record, and due to the fact that they are now in the official custody of the Circuit Court of Appeals for the Fifth Circuit, can only be presented to the Supreme Court of the United States by virtue of an order of the Supreme Court of the United States requiring the Circuit Court of Appeals for the Fifth Circuit to send them up to the Supreme Court of the United States and your petitioner accordingly prays for such order to be made and entered by the Supreme Court of the United States. And your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings, together with all original exhibits on file in that certain cause numbered and entitled on its Docket No. 11848, Donald R. Manning, Appellant, v. United States of America, Appellee, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Court, and that your petitioner be discharged without day and have such other and further

relief in the premises as this Honorable Court may deem just and proper.

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.....

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SUPREME COURT OF THE UNITED STATES.

No. .....

DONALD R. MANNING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AND ARGUMENT

In Support of Petitioner's Petition for Writ of Certiorari.

POINT I.

A Probationer May Not Have His Probation Revoked and Be Sentenced Until He Has Been Given Notice of the Specific Charge and an Opportunity to Be Heard in His Defense.

Hollandsworth v. U. S., 34 Fed. (2d) 423;
Escoe v. Zerbst, 55 Sup. Ct. 717, 79 L. ed. 1566.

The following language is quoted from the decision in the case of **Hollandsworth v. U. S.**, supra, an opinion rendered by the Circuit Court of Appeals for the Fourth Circuit on July 15, 1929:

> "It is not conceivable that Congress intended to confer upon the Court the power to call back the

defendant at any time within five years after conviction and imprison him, no matter how blameless his conduct may have been during the interim or how strictly he may have observed the terms of his probation. It follows that, whenever it is charged that a probationer has failed to follow the instructions of the Court, he may not be sentenced until he has been given notice of the **specific charge and an opportunity to be heard in his defense**, and until the Court, upon hearing, shall have judicially determined that his conduct during the probation period has not conformed to the cause outlined in the order of probation." (Emphasis ours.) **Hollandsworth** Case, supra.

It is the insistence of the petitioner that he was not given notice of the specific charge against him, nor was he given a fair hearing in this cause. It is not suggested that the conduct of the hearing before the Judge of the District Court was intentionally unfair on the part of the Judge, but it is seriously insisted that the procedure followed by the Judge resulted in the denial of this petitioner of a fair opportunity to be heard in his defense on the charges brought against him, which is the essence of a fair hearing and in this case amounted to an abuse of that judicial discretion vested in the Court by the law under which probation is granted.

Each of the two trial judges for the District Court for the Northern District of Alabama were of the opinion that it was not necessary for the probationer to be informed of the particulars of any charge which was laid against him as a basis for violating his probation. When the probationer was brought into court on the 15th day of November, 1946, counsel for the petitioner advised the court that petitioner had not seen the charges and had not seen the affidavit and had not been served with any copy of any affidavit, or amended affidavit and complaint in order that petitioner might prepare his case (R. pp.

64-65) and was informed by the Court that no formal complaint was required,

> "that the probation officer merely comes in and states to the Court that the defendant has violated the conditions of the judgment of the probation" (R. p. 65),

and thereafter informed the Court that he did not have a copy of the affidavit, nor a copy of the warrant issued in this case.

The Court then overruled the petitioner's motion for a formal complaint and announced that the case would "be heard on next Friday morning."

Counsel for petitioner also informed the Court at that time that they had first seen petitioner on that morning and had learned in a general way that he was charged with practicing medicine without a license.

> "We don't know who the witnesses are. We don't know what he is charged with. We have had no opportunity to summons witnesses, and the first element of any fair hearing is that a man be informed of what he is called upon to answer and be given a chance to produce witnesses" (R. p. 68).

Then in open court, later on the same day, counsel for the government stated that the government charged that the probationer used the mails to defraud one Charles Edel of Box 117, Cherokee, Alabama (R. p. 69); and the same charge with reference to M. T. Hanson of Repton, Alabama; and the same charge with reference to Olin Harold of Box 369, Bay Minette, Alabama (R. p. 70).

The Court, thereupon, passed the hearing until the 22nd day of November at 10:00 o'clock, A. M.

Thereafter, on the 22nd day of November at 10:00 o'clock, A. M., petitioner, with his counsel, again appeared

in Court and made a motion for a more particular statement of the type of violation (R. p. 71) and the Court at that time stated:

> "I concur in Judge Lynne's ruling that you are not entitled to it. I don't think, as a matter of fact, that you are entitled to a formal trial in the matter, but I expect to give you one" (R. p. 71).

Counsel for petitioner then advised the Court that he had been given a memorandum of the charges, headed "Probation Revocation Hearing, Birmingham, Alabama, Court Docket No. 11655 S., Probation File No. 7229," and down at the bottom there was the notation, "Witnesses to be listed," and moved the Court for a more particular specification, etc. (R. pp. 72-73), which motion was overruled and exception duly taken.

Thereupon the petitioner was put to trial (R. p. 74).

Petitioner, through his counsel, stated to the Court that they had made every effort to ascertain what act or conduct was charged as being a violation of the Alabama statute against the practice of medicine without license, or what act or conduct was charged as being a violation of the federal statute prohibiting the use of the mails in furtherance of schemes to defraud, that being the two conditions of the probation with which petitioner was charged in the memorandum (R. p. 73); that they had been to the Clerk's Office and demanded a list of the witnesses summoned by the government, which was refused; and he was not informed of any of the facts concerning any act or conduct charged against him (R. p. 73).

The only evidence presented against this petitioner with reference to using the mails for the purpose of fraud was evidence procured by an entrapment of petitioner by a Post Office Inspector of the Federal Government working in

conjunction with Federal Agents connected with the Food and Drug Administration of the Federal Government (R. pp. 77-110, 111 et seq.). It appeared that the letters upon which the charges of using the mails to defraud were based, and the shipments of drugs connected therewith, were procured by virtue of an entrapment perpetrated by the said Wilkerson and that the names of the parties by whom the letters were purported to be addressed were fictitious. Petitioner was not advised that doctors and chemists from the Pure Food and Drug Administration would be present and testify against him. He had no opportunity to prepare his defense to their testimony.

It is respectfully submitted that under these circumstances the petitioner was denied that fair hearing which is essential to the exercise of a judicial discretion and that the ruling of the Circuit Court of Appeals in this respect is in conflict with the holding of the Circuit Court of Appeals, Fourth Circuit, in the case of **Hollandsworth v. U. S.**, 34 Fed. (2d) 423, in two definite particulars:

(a) He was not given notice of the specific charge to be brought against him.

(b) He was not given a fair opportunity to be heard in his defense.

POINT II.

There Being No Federal Law Regulating the Practice of Medicine in a State, the Statute of the State and Decisions of the State Courts of Last Resort Are Binding Upon the Federal Courts in any Proceeding Instituted Therein.

Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286;
Watson v. Maryland, 218 U. S. 173, 30 Sup. Ct. 644;
McVicar v. State Board of Law Examiners et al., 6 Fed. (2d) 33;
Title 28, Sec. 725, U. S. C.

In the case of **McVicar v. State Board of Law Examiners et al.**, 6 Fed. (2d) 33, wherein McVicar attempted to enjoin the Attorney General of the State of Washington from instituting proceedings to disbar him, under the provisions of a statute to regulate the practice of law in that State, the Court ruled:

> "That whenever there has been a construction of a state constitution or state statute by the court of last resort of the state, it is binding and conclusive in all federal courts in which such construction is involved, no matter by what procedure the same may be brought to the attention of the Federal tribunal."

The Alabama Statute regulating the practice of medicine is Title 46, Sec. 262:

> "Any person who treats or offers to treat diseases of human beings in this state by any system of treatment whatsoever, without having obtained a certificate of qualification from the State Board of Medical Examiners, shall be guilty of a misdemeanor and upon conviction shall be fined for each offense not less than fifty nor more than five hundred dollars, and may be imprisoned for not less than one month nor more than three months, and where indictments are preferred by a grand jury such cases shall be only tried in the court wherein the indictment is preferred and shall not be transferred to any court."

The controlling case relative to the practice of medicine in the State of Alabama is **Harper v. State**, 102 So. 55. In the Harper case the defendant was a licensed vendor of patent medicines. Certain parties who testified as witnesses for the state went to defendant and told him they suffered from certain diseases of the back, and he sold them of his wares on which there were labels recommending such medicines for the ailments indicated and designated the dose to be taken. Defendant did not hold himself out as a physician, made no charge for services

as such, and received no compensation other than such profit as he derived from the sale of the patent medicine. It is also in evidence that in selling the medicine defendant recommended it as being a remedy for the disease specified.

The defendant had been convicted in the lower court and the Alabama Court of Appeals reversed the decision stating in their opinion the actions of the defendant did not constitute a violation of the Alabama Statute.

The Government would like to follow the minority opinion in this case and in order to show the full facts upon which the court ruled, the following excerpt from the minority opinion is given:

> "The evidence for the state tended to show the following facts: The defendant was a vendor of patent medicines and on several occasions various parties had come to him afflicted with diseases or physical troubles such as rheumatism, indigestion, and gonorrhea. The parties suffering from such diseases related to the defendant their troubles and the defendant directed that they should take certain medicine out of his stock of patent medicine which he was selling. He told them that such medicine would cure or remedy the disease complained of. The parties dealing with him purchased the medicine he advised and followed his directions in taking it."

By no stretch of imagination can the petitioner, Manning, be said to have gone to any greater extent, offered any more advice, or made any suggestions relative to treatment that went further than the actions indicated in the Harper case. If Harper was not practicing medicine then Manning was not practicing medicine. While it is true that counsel for the Government would attempt to lead the court to believe that the minority opinion was the proper opinion to follow, yet the majority opinion controls and the rule in

this case governs the practice of medicine in the State of Alabama. It is further called to the Court's attention that no witness appeared in behalf of the Government who was properly qualified to testify as to what is the practice in medicine in the State of Alabama.

The opinions given by the doctor who worked for the Government were not based on any knowledge of the Alabama law, as the doctor plainly stated that he had no knowledge of what would constitute the practice of medicine in the State of Alabama. We respectfully suggest to the Court that it is not the duty of the United States Government to regulate the practice of medicine in the State of Alabama, but that is a duty that is left with the state itself. If the State of Alabama wishes to allow certain practitioners to follow their practices in this state and some other state would prohibit them from practicing in that state, certainly it is not the obligation of the Government to step in and try to dictate who can practice medicine in any particular state.

It would appear to be an extremely dangerous precedent for the federal courts to adopt the expedient of probation hearings with the main purpose in view of imposing a federal rule, relating to the practice of medicine in a state, upon probationers contrary to the law of the state where the probationer lives. This amounts to an intrusion in matters of peculiar domestic concern. In the instant case the Pure Food and Drug Administration has adopted the expedient of going beyond the legitimate scope of its own functions (a) to interfere with the administration of the probation laws and assume the duties of a probation officer in checking up on a probationer; (b) in an effort to impose the federal law with reference to interstate commerce in drugs and medicine upon transactions wholly within the state, contrary to the law of the state with regard to such intrastate transactions. To permit this would appear to be very unsound policy.

The decision in the Harper case was the law in this state when rendered in 1924 and this decision has not been overruled. Further, an application for rehearing was made in this case and the application was denied, and Justice Foster, in setting out the minority of the Court, rendered the following decree:

> "I respectfully dissent from the views expressed in the majority opinion. If the law is as there laid down, the 'Indian Doctor' may peddle patent medicines from house to house and under the guise of a patent medicine vendor visit the sick in their home and upon inquiry as to the nature of their diseases prescribe for their ailments whether they be tuberculosis, venereal diseases, malaria, typhoid fever or what-not. They impose upon the ignorant and the gullible without fear of molestation by the officers of the law. The law of Alabama as I understand it and as given in my original dissenting opinion in this case to which I now adhere is intended to discountenance and prevent such practices. I am of the opinion that the application of the State for a rehearing should be granted and that the judgment of reversal should be set aside and the judgment of the lower court affirmed."

Has any of the testimony in this case, that is, the Manning case, shown that the petitioner did anything or went beyond the scope of the actions allowed under the Alabama Statute beyond those actions as set out in the minority opinion of Judge Foster? Judge Foster plainly stated that a man may peddle patent medicines and that he may visit the sick, and that he may inquire as to their diseases, and that upon learning of their troubles he may suggest, recommend, or prescribe certain medicines for their use.

In the case at bar, has it ever been shown that the petitioner, Manning, was ever paid a single cent for any examinations or any diagnosis which it is claimed that he made?

An exhibit has been submitted to the Court wherein the prices charged by Manning for medicines were quoted. And an examination of this price list will show that his medicines all sold for very nominal sums ranging from 24¢ up. It is outrageous to contend that a man who sells a package of medicine or capsules for the sum of twenty-five or fifty cents is practicing medicine or has received any money or compensation for any recommendations or suggestions that he made.

The unusual nature of the prosecution in this case is brought to the Court's attention, in view of the fact that not a single patient or so-called patient of the petitioner has been brought before the court to testify that the preparations sold to him by the petitioner were not beneficial.

While it may be possible that these preparations were not able to completely cure or alleviate all conditions, I wonder if it has not been the experience of the members of this Honorable Court that they have in times past been treated by physicians who recommended certain remedies or medicines for their physical ailments, and upon taking these various medicines, the members of the Court found that they were of no benefit whatsoever, and we are sure that no member of this Court has yet to find a physician who made a refund because of the failure of his recommendation or diagnosis. Fortunately, physicians bury their mistakes.

POINT III.

The Good Faith of a Defendant in a Prosecution for Making Use of the United States Mails in Furtherance of a Scheme to Defraud Is a Complete Defense.

Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709;
Rudd v. U. S., 173 Fed. 912 (C. C. A.);

Sandals v. U. S., 213 Fed. 569 (C. C. A.);
West v. U. S., 69 Fed. (2d) 96 (Tenth Circuit);
Gold v. U. S., 36 Fed. (2d) 16.

Mr. Justice Brewer, in the case of **Durland v. U. S.**, 161 U. S. 306, 16 Sup. Ct. 508, at 511, said:

> "The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident Company and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could, by investment or otherwise, make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme." **Durland v. U. S.**, supra.

The case of **West v. U. S.**, 68 Fed. (2d) 96, is on all fours with the instant case, except in the West case the defendant was being prosecuted in a plenary proceeding before a jury and in the instant case petitioner was being prosecuted on probation hearing before a judge, and, of course, the measure of proof in a criminal case is that the evidence should be sufficient beyond all reasonable doubt, whereas the measure of proof in the instant cast is that the judge be reasonably satisfied. However, in the case of **West v. U. S.**, supra, the Circuit Court of Appeals for the Tenth Circuit held that evidence practically identical to that in this case was not sufficient to go to the jury on the guilt of the defendant charged with using the mails in furtherance of a scheme to defraud.

It is interesting to note that one of the two chief witnesses in the West case was the same Dr. Norris who testified in the instant case for the government. It is also interesting to note that this same Dr. Norris, in the West case, stated that he didn't consider "Potter's Therapeutics

Materia Medica and Pharmacy" an authority, just as he testified in the instant case when the petitioner introduced that book as his authority for the recommendations which he made with regard to the beneficial qualities of the medicinal preparations which he sold. It will be observed from reading the testimony of Dr. Norris (R. pp. 119-168) that he admitted that preparations which petitioner sold were beneficial in alleviating the ailments for which petitioner recommended such preparations. He admitted that the description of his condition as stated in the letter from Olin Harold to Manning Herb House (R. pp. 121-123) would indicate, among other conditions, an ulcerated stomach, thereby admitting that the petitioner had made no false statement with regard to the condition of Harold. He also admitted in his testimony that the calcium carbonate contained in the medicine recommended by this petitioner would be beneficial in relieving or alleviating such condition:

> "Yes, the use of this preparation as directed would help some stomach ulcers, alleviate the symptoms temporarily, help some stomach ulcers in the course of time if they keep taking this and keep feeling better."

It further appears from the evidence that the petitioner sold his medicine upon a guarantee to refund the money if the customer was not satisfied, and that he faithfully complied in every instance with this guarantee.

It is respectfully submitted to the Supreme Court of the United States that on a trial held in a probation hearing to determine whether or not the probationer has violated the conditions of his probation prescribing that he shall not violate a federal law the judge should not find the probationer guilty of violating a federal law upon any evidence where it would be his duty to direct the jury to acquit, if the man stood charged before a jury of violating the same federal law.

The Circuit Court of Appeals seems to have misconstrued the rule to be that a federal judge can revoke a probation without any evidence to establish the criminal offense upon which the revocation is based.

We respectfully submit that the revocation of probation in this case cannot be supported upon the ground that petitioner violated a federal law in that he used the mails in furtherance of a scheme to defraud as charged in the memorandum filed against him and we respectfully submit that in this particular the judgment of the Circuit Court of Appeals stands to be reversed.

POINT IV.

An Order Admitting a Defendant to Probation May Not Be Revoked Arbitrarily by the Judge, the Probationer Being Entitled to the Opportunity of a Fair Hearing Upon Specific Charges With a Fair Opportunity to Defend.

Hollandsworth v. U. S., 34 Fed. (2d) 423;
Escoe v. Zerbst, 55 Sup. Ct. 717, 79 L. ed. 1566.

The Circuit Court of Appeals for the Fourth Circuit, stated in the case of Hollandsworth v. U. S., 34 Fed. (2d) 423:

> "* * * **whenever it is charged that a probationer has failed to follow the instructions of the Court, he may not be sentenced until he has been given notice of the specific charge and an opportunity to be heard in his defense, and until the Court, upon hearing, shall have judicially determined that his conduct during the probation period has not conformed to the cause outlined in the order of probation.**" **Hollandsworth case**, supra.

In the instant case it is the insistence of the petitioner that he was denied that fair hearing which it is the genius of our American system of justice to guarantee to every

person before the imposition of any penalty can be justified.

It is respectfully submitted that a judge can not impose upon a probationer his own arbitrary ethical conception of what is right and what is wrong, nor can a judge impose upon a probationer a standard of conduct higher than that required by law, unless the probationer has been given notice in his order of probation of the specific act which it is the order of the court he may not do or perform.

In the instant case the probationer was not given notice of any charge against him prior to being arraigned by the court. In fact, no charge was filed against him when he was first arraigned in court and during the time of the arraignment a mere memorandum called a "Probation Officer's Statement" was brought to the attention of the Court.

The proceedings began with an original parol charge against this petitioner that he was violating the Alabama law by practicing medicine without a license. A condition of his probation was that he should not "**violate any state or federal law.**" Later this charge was orally amended by charging that he had "used the mails to defraud" in three instances. This amounted to a charge that he had violated a condition of his probation that he should not "violate any state or federal law." So it appears that any violation charged against him hinged around the charge that he had violated a condition of his probation that he should **not "violate any state or federal law."**

It is his contention here that he was not given specific notice of the act charged against him, contrary to the rule announced in the **Hollandsworth case**, supra. It is further his contention that he was denied a fair opportunity to

defend when the court refused to require the government to inform his counsel of the particular acts of misconduct charged against him and that the injury of this denial was emphasized and accentuated by reason of the fact that he was denied opportunity to know what witnesses would be called to testify against him. It was, therefore, left open to the wide area of imagination for him to determine what he would be called upon to answer at the time the case proceeded to trial. This certainly does not conform to the American standard of judicial procedure, whether the hearing be summary or whether it be plenary.

The probation officer never took the witness stand. The undisputed testimony was that the petitioner had, in every instant, conformed to every instruction of the probation officer and that he had kept the probation officer fully advised and fully informed as to his method of doing business; that immediately upon his sentence upon the original charge and admission to probation, he had discontinued every act which might be construed as violating the federal law concerning the interstate transportation of drugs in violation of the Pure Food and Drug Act and regulations made pursuant thereto; that he had continued to operate his Drug Store at Bessemer, Alabama, from the date he was admitted to probation, and to operate his bath-cabinets with the full knowledge and approval of the probation officer; that he had submitted to the probation officer copies of letters which he had written and requested the advice and counsel of the probation officer with regard to these letters. The probation officer was sitting in the Court room, hearing all of the testimony and had the petitioner's testimony along this line been in the slightest degree false, most certainly the probation officer would have taken the witness stand to deny such false statements.

No witness was brought against this petitioner who lived in the State of Alabama. Not a single physician or druggist in the State of Alabama complained. Not a

single customer of petitioner complained. It is patent from reading the testimony that the chief object of the entire proceeding by the Pure Food and Drug Administration in Washington, D. C., was to put this man out of business entirely, notwithstanding it clearly appears that he had committed no act which came within their jurisdiction. It clearly appears that the Pure Food and Drug Administration was seeking to impose upon a domestic intrastate enterprise a standard of conduct meeting their approval with regard to interstate commerce, and that, in order to do so, having no law to accomplish their purpose, they set out to administer the probation system by checking upon this petitioner, entrapping him, and instituting proceedings to revoke his probation.

If the Court had intended at the beginning that this petitioner should terminate his domestic drug business, the court could easily have made that one of the conditions of probation. The petitioner would then have had fair notice that he could not sell his drugs any longer and that he could not conduct his business of administering baths to the public, if the court had, in its order of probation, forbidden such conduct, but when the court did no more than forbid him to "violate a state or federal law," certainly the court then had no power to punish him unless there was some evidence of such a violation.

In applying the standard to determine the violation, the court was bound by the construction of the courts placed upon these laws, state and federal. It was not within the province of the court to impose its own peculiar ethical conception as to what a man should or should not do, under the guise of administering and interpreting the state or federal law and determining when, or if, said state or federal law had been violated.

There was **no charge made that the petitioner had been dishonest, or had committed any dishonest act.** In fact,

it was decidedly admitted by the government at the trial that he had been honest and conducted an honest business, giving value received for the money received. Yet the court, when it came to pronounce judgment, first announced that probationer's probation was revoked for and on account of the fact that the court had determined that probationer had been violating the Alabama law with regard to practicing medicine without a license. Then, as an afterthought subsequent to an appeal by petitioner with regard to punishment to be imposed, added a finding that the petitioner had violated the federal law with reference to using the mails to defraud, and, evidently having some doubt with regard to the correctness of these findings, went further and based the revocation of probation upon "dishonesty."

May we say, in all respect to the trial judge, that we have absolute confidence in his intention to be fair. However, for some reason, there seems to have developed in the mind of the trial judge an attitude of prosecution, rather than that impartiality which adorns the conduct of a trial judge. A few of the many instances of this "prosecuting" attitude on the part of the trial judge are illustrated by the fact that after the case had been rested and counsel for the government and counsel for defendant were to argue the case and hearing had been passed for the sole purpose of the argument, and all witnesses had been excused, when the court resumed its hearing on November 25, 1946, the court proceeded to interrogate the petitioner with regard to a complaint which had been made against the petitioner in the State of Georgia many years before he came to Alabama and many years before this petitioner was convicted and admitted to probation in the instant case (R. p. 251).

Then the court took a recess and after the recess was over, again called the petitioner to the witness stand to

prove that the probation officer had given the petitioner a copy of an instrument admitted in evidence as Court's Exhibit A (R. p. 252).

It clearly appears that the petitioner was never convicted of any offense in the State of Georgia so far as the evidence in this case shows (R. p. 253). The Court's statement (R. pp. 253-4) clearly shows that the Court was imposing its own personal view as to what would constitute practicing medicine and with regard to the proper policy to be enforced in the State of Alabama with regard to the sale of drugs and proprietary remedies.

The Court's statement also shows that the Court was considering the fact that somebody made a complaint in Georgia against him which was never tried by any court, and, for aught that appears here, was never officially recognized as a complaint by any court, and which occurred many years before he was admitted to probation (R. p. 256).

It further appears that the Court was imposing its own ethical view with regard to what was honest business or dishonest business without regard to the rule of the federal cases and the Alabama state cases to which we have called this Court's attention. Notwithstanding the fact that when, during the hearing, petitioner started to prove the intrinsic honesty of his business by showing that he gave value received for the money received; that the medicine which he offered for sale had a comparative value equal to that of other medicines sold by other reputable persons engaged in the business at a comparative price, and when he started to prove his general good reputation and general good character for truth and honesty, the court cut him off by saying that the court would assume him to be a man of truth and honesty.

It also appears in evidence that the probation officer was present and interrogated this petitioner and caused

this petitioner to make a statement in the presence of a postoffice inspector to be used against him in these proceedings, after these proceedings were begun and before the trial. This court is familiar with the fact that a probationer is required by the rules of the court to make full confession and free disclosures to the probation officer.

We respectfully submit that it is not fair to a probationer for a probation officer to take an enforcement officer of another arm of the government with him when he interviews his probationers, or to permit them to be present at such time during such interviews and then permit these enforcement officers to use any statement thus obtained, directly or indirectly, from the probationer under the coercion of a required interview with the probation officer as evidence.

It further appears that the court permitted a doctor who was not acquainted with Alabama law, who had never lived or practiced in Alabama and who was an agent of the Pure Food and Drug Administration at Washington, D. C., to testify as to his opinion as to what constituted the practice of medicine in Alabama.

We might recite many other instances. The record is replete with instances along the same line.

CONCLUSION.

We respectfully submit that when a probationer attempts, as this probationer did, in good faith to comply with the instructions and advice of the probation officer, and requests the probation officer to advise him with regard to his practices and so conducts himself that the probation officer sees no reason to institute proceedings on his own initiative; when the proceedings are initiated by the Pure Food and Drug Administration of Washington, D. C., which has no function to perform with regard to

probation, solely for the purpose of imposing upon a resident of a state, in the conduct of his intrastate business, a standard of conduct which they are not authorized by law to impose and attempt to adopt the expedient of using the probation system to interfere in matters of state domestic policy and law, it amounts to such an intrusion of federal interference with said affairs that if it be permitted to stand, will open the door for the federal government, through the expedient of the federal probation system, to interfere with domestic affairs of a state with regard to any domestic matter.

It may be true that many people would not buy and use the proprietary remedies sold by the petitioner. It is also true that many people cling to the old ideas. The book offered in evidence by the petitioner as authority for his opinion that the medicines sold by him had curative properties with regard to the ailments for which they were recommended, Potter's Cyclopedia of Botanical Drugs and Preparations (R. p. 216), is expressly recognized as sufficient authority to justify petitioner's position in the case of **West v. U. S.**, 69 Federal (2d) 96, where the Circuit Court of Appeals for the Tenth Circuit, notwithstanding the testimony of the same Dr. Norris who testified in this case, held that the seller of drugs, basing his claims for their curative properties upon Potter's Cyclopedia of Botanical Drugs and Preparations, was fully justified and entitled to the directed verdict on the ground of good faith.

It would, therefore, follow that the trial judge in this case was arbitrarily imposing his own ethical notion as to the propriety of a person using the medicines which this petitioner sold; that he was attempting to impose a standard upon the entire public of complying with the standards for use and sale of medicines adhered to by one school of thought, and to deny all persons who adhered to another school of thought with regard to the proper drugs

and medicines to be used for the treatment of human ailments and diseases, the right to the exercise of their own judgment. That the trial judge was honest in his own ethical view does not mitigate the fact that his decision was arbitrary and in conflict with the rule announced in West v. U. S., supra.

If the court had desired to prohibit petitioner from selling these medicines it could have done so by adding a further condition of probation and the petitioner would cheerfully have complied therewith.

It is respectfully submitted that the sentence and judgment in this case should not be maintained and that this court should, upon petition for certiorari, reverse and render the cause, or remand it with proper instructions to the court below.

Respectfully submitted,

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